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April 18, 2002

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12th St., SW  
8th Floor  
Washington, DC 20554

Re: PGTV Request for Delay of 700 MHz Auctions  
WT Docket No. 99-168  
GN Docket No. 01-74

Ex Parte Communication

Dear Chairman Powell:

The Spectrum Clearing Alliance ("the "Alliance"), by its attorneys, hereby opposes the April 15, 2002 *ex parte* request of PGTV, Inc. ("PGTV") for an indefinite delay and modification of the 700 MHz auctions that will commence on June 19, 2002 (Auction Nos. 31 and 44).<sup>1</sup> The Commission should reject PGTV's eleventh hour attempt to delay for a sixth time the upper 700 MHz auction by reopening regulatory issues that have been settled by the Commission in the course of more than two years of notice and comment rulemakings. As the Alliance has repeatedly pointed out, **further delay of the upper 700 MHz auction will mean the end of voluntary band-clearing**. PGTV has given the Commission no worthwhile reason to postpone the auctions at this late date. Instead, the Commission should move ahead with its 700 MHz auction plans and allow the implementation of its carefully crafted band-clearing rules.

The Alliance was formed to promote and facilitate the timely clearing of the upper 700 MHz band. As a result of the active participation of Paxson and the Alliance in numerous FCC proceedings, and of the wireless industry as well, the Commission has adopted novel mechanisms to allow voluntary clearance of the upper 700 MHz spectrum which, in turn, will help ensure a successful auction and the prompt implementation of new public safety and commercial wireless communications services in that band. In addition to Paxson, the Alliance includes a significant and increasing number of broadcasters operating throughout the United States. Paxson's 19 stations and Univision Communications' 16 stations in the band comprise

<sup>1</sup> See Letter to Chairman Powell from Henry Goldberg, April 15, 2002 (the "Delay Request").

approximately 40% of the encumbered broadcast spectrum. As the auction date approaches, the Alliance continues to add members at an accelerating pace.

PGTV is a recently formed "entrepreneurial company," with a nascent and untested vision of using the 700 MHz frequencies for multi-channel video programming.<sup>2</sup> According to a recent article in the Wall Street Journal, PGTV has yet to secure the "billions of dollars of financing" required to make its concept a reality.<sup>3</sup> The company's founder even admits that PGTV does not plan to hire full-time employees unless it wins the auction.<sup>4</sup>

In contrast, Paxson Communications Corporation ("Paxson"), on its own behalf and as a founder of the Alliance, has worked diligently with the FCC for over two years to expedite clearance of the upper 700 MHz spectrum in accordance with Congress's statutory directive and the Commission's regulatory guidelines.<sup>5</sup> During this period, Paxson and the Alliance have submitted numerous comments, reply comments, letters and petitions in each of the Commission's proceedings regarding the reallocation of and service rules for the 700 MHz spectrum and the auctions that will commence on June 19, 2002. As a result of this substantial, long-term effort, as well as the participation of dozens of other commenters, the FCC has adopted final rules for the 700 MHz spectrum and the auction procedures to be used to award new commercial wireless licenses. A critical element of those rules is the Alliance's plan for clearing the upper 700 MHz band for public safety and commercial wireless use. More recently, Paxson filed numerous regulatory requests that are likely to lead to clearing Paxson's stations from the upper 700 MHz band, and one such request already has been granted. As Paxson and the Alliance have repeatedly noted, however, band-clearing requires regulatory certainty to succeed.

That certainty was recently provided by the Wireless Telecommunications Bureau's (the "Bureau") denial of Cellular Telecommunications & Internet Association's ("CTIA") request for a sixth delay of the upper 700 MHz auction.<sup>6</sup> Into this certainty, PGTV has thrust its requests for an indefinite delay of the 700 MHz auctions, a combination of the upper and lower 700 MHz auctions, a reduction in the reserve price set for the upper 700 MHz auction, and a significant change in the upper 700 MHz service rules to permit higher-powered operations in the upper 700 MHz band. The Commission and the Bureau, however, have decided each and every one of

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<sup>2</sup> See Delay Request at 2 & fn.1.

<sup>3</sup> Rebecca Buckman, *Entrepreneur Aims to Sell Total.TV, Undercutting Costs of Digital Cable*, WALL STREET JOURNAL, B10, April 16, 2002 (quoting PGTV founder Phil Goldman).

<sup>4</sup> See *id.*

<sup>5</sup> See e.g. Service Rules for the 746-764 and 776-794 Bands and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 15 FCC 476, 534 (2000) ("*First Report and Order*"); *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 20845, 20860-72 (2000); *Third Report and Order*, 16 FCC Rcd 2703, 2705, 2717-18 (2001); *Order on Reconsideration of the Third Report and Order*, FCC 01-258, WT Docket No. 99-168, ¶ 11 (rel. September 17, 2001).

<sup>6</sup> Letter to Mr. Thomas E. Wheeler from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, DA 02-857 (rel. April 11, 2002).

these issues through the due deliberation of notice and comment rulemaking procedures. In addition to its denial of CTIA's proposal that the auctions be delayed, the Bureau previously considered and rejected proposals to delay the auctions during recent proceedings setting the rules and procedures for Auctions Nos. 31 and 44.<sup>7</sup> Moreover, in the upper 700 MHz auction proceeding, the Bureau specifically rejected linking the 700 MHz auctions and reducing the \$2.6 billion reserve price for the upper 700 MHz spectrum.<sup>8</sup> Finally, the Commission extensively considered the appropriate power limits for upper 700 MHz spectrum users in its upper 700 MHz service rules proceeding, deciding after notable debate that interference concerns justified the adoption of a 1 kW limitation.<sup>9</sup> PGTV has offered no persuasive reason for a protracted reexamination of any of these decisions.

Instead, PGTV has introduced a sketch of a business plan that is long on promises but short on details. The mere possibility that PGTV might participate in and win the auctions and then one day provide new services in the band cannot justify the substantial harm that any delay of the auctions would cause to the expeditious provision of much needed spectrum for public safety agencies and new commercial wireless services. In short, PGTV's proposal does not change the fact that upper 700 MHz band-clearing as promoted by the Alliance, adopted by the FCC and implemented by upper 700 MHz broadcasters remains the most viable, developed path to achieving these recognized public interest benefits.

PGTV's claim that its proposed service would require changes to the permissible power levels in the upper 700 MHz band is no basis for a sixth delay of the upper 700 MHz auction. PGTV cannot seriously expect the FCC to shelve two years of auction planning and implementation to institute a rulemaking proceeding to reconsider setting upper 700 MHz power levels to accommodate a service that would become viable only if PGTV manages to win all or nearly all the spectrum available in Auctions Nos. 31 and 44. PGTV should bid for the spectrum first, and then, if successful, request the changes necessary to facilitate its proposed service.

PGTV's further concern about the current configuration and bidding schemes for the upper 700 MHz auctions<sup>10</sup> would have been properly addressed in the now terminated auction proceedings, where the issues of auction configuration and delay were aired fully. PGTV's assertion that it could not participate in those proceedings because it is was only recently formed is not availing. The acknowledged interests of public safety agencies, commercial wireless service providers and broadcasters in the scheduled completion of the 700 MHz auctions cannot

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<sup>7</sup> See Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for June 19, 2002, Further Modification of Package Bidding Procedures and Other Procedures for Auction No. 31, *Public Notice*, Report No. AUC-02-31-B (Auction No. 31), DA 02-659, fn. 69 (rel. Mar. 19 2002) ("*Auction No. 31 Notice*"); Auction of Licenses in the 698-746 MHz Bands Scheduled for June 19, 2002, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures, *Public Notice*, Report No. AUC-02-44-B (Auction No. 44), DA 02-563, fn. 70 (rel. Mar. 20, 2002).

<sup>8</sup> See *Auction No. 31 Notice* at 4-7, 32-36; *Auction No. 44 Notice* at 3-6.

<sup>9</sup> See *First Report and Order*, ¶¶ 108-111.

<sup>10</sup> See n.8, *supra*.

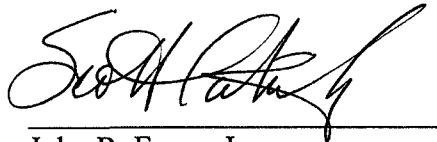
be sacrificed merely because PGTV claims its proposal was conceived after the Commission had adopted the rules and procedures that would govern those auctions.

The only proper response to PGTV's delay request is to deny it. The Commission has made its decision to follow its Congressional directive and it must stick to it – there is no other way to achieve band-clearing or the introduction of new services in the 700 MHz bands. The Commission should not make hasty and unnecessary changes to its well-settled rules and policies to facilitate an unsubstantiated, untested plan by an unfunded party that did not participate in the 700 MHz proceedings because its plan was only recently conceived. Most importantly, a further delay of the upper 700 MHz auction would permanently derail upper 700 MHz band-clearing and turn the 700 MHz band into a vast wireless spectrum warehouse – an outcome that the Commission cannot allow given its mandate to turn that spectrum to new and important services as quickly as possible.<sup>11</sup>

For these reasons, PGTV's request for a delay in the 700 MHz auctions must be denied, and the FCC must reaffirm again that the 700 MHz auctions will be held as scheduled on June 19, 2002.

Sincerely,

SPECTRUM CLEARING ALLIANCE



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<sup>11</sup> See 47 U.S.C. § 337(a); Consolidated Appropriations Act, 2000 Pub. L. No. 106-113, 113 Stat. 2502, Appendix E, § 213.